90-137

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

TRANS PACIFIC BANCORP,
TRANS PACIFIC NATIONAL BANK, et al.,
Petitioners,

vs.

RICHARD F. SCHEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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July 18, 1990

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does the National Bank Act (12 U.S.C. § 24, Paragraph Fifth), which provides that the board of directors of a national bank can terminate bank officers "at pleasure," preempt state-created retaliatory discharge or retaliatory removal-of-director claims brought against a national bank by a former bank officer?

2. Does the Comptroller's exclusive prosecutorial authority under the National Bank Act (12 U.S.C. §§ 93(a) and 1881(b)(1)) preempt and preclude a private right of action against a national bank under state law for retaliatory discharge of a former bank officer or retaliatory removal of a former director?

LIST OF PARTIES AND RULE 29.1 LISTING

The parties to the proceedings below were the petitioners Trans Pacific Bancorp (erroneously identified by Respondent Schey as "Trans Pacific National Bancorp" in the original and first amended complaints), Trans Pacific National Bank, Eddy S.F. Chan, Dr. Arthur M. Auerbach, James A. Babcock, John T. Stewart and Simon S. Teng, and the respondent Richard Schey.

The petitioners and respondent before this Court are all the persons or entities that were parties to the proceedings below.

Petitioner Trans Pacific Bancorp has no parent companies, subsidiaries or affiliates to list except as follows: AFI Public Ltd., which holds 8.8% of its outstanding voting securities; Commercial Discounters, Ltd., which holds 9% of its outstanding voting securities; Arthur M. Auerbach, who owns 6.2% of its outstanding voting securities; and Trans Pacific National Bank, which is a subsidiary, a named party in the proceeding below and a petitioner before this Court.

Petitioner Trans Pacific National Bank has no parent companies, subsidiaries or affiliates to list except for Trans Pacific Bancorp, which is its parent and holding company, a named party in the proceeding below and a petitioner before this Court.

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TRANS PACIFIC BANCORP,
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Petitioners,

vs.

RICHARD F. SCHEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

Petitioners (collectively "the Bank") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District (Division Five), entered in the above entitled proceeding on January 24, 1990, the petition for review on which was denied by the California Supreme Court on April 26, 1990.

OPINION BELOW

The Opinion of the California Court of Appeal was initially published and reported at 217 Cal.App.3d 432, 266 Cal.Rptr. 39 (1990), but three months after publication was ordered depublished by the California Supreme Court when it denied the Bank's petition for review. The Opinion of the California Court of Appeal is reprinted in the appendix hereto as Appendix A.

JURISDICTION

The California Court of Appeal Opinion was issued on January 24, 1990. The Bank's petition for rehearing was denied by the California Court of Appeal on February 21, 1990. On April 26, 1990, the California Supreme Court denied the Bank's petition for review.

The jurisdiction of this Court to review the Opinion and Judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(a) and Rule 13.1. of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

12 U.S.C. § 24 (Fifth)

Upon duly making and filing articles of association and an organization certificate *a national banking association* shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it *shall have power . . . [t]o* elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure,* and appoint others to fill their places. [Emphasis added.]

12 U.S.C. § 93(a)

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall thereby be forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved.

12 U.S.C. §1818(b)(1)

If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party . . . is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule or regulation, . . . the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. . . .

STATEMENT OF THE CASE

I

PROCEEDINGS BELOW

This case was initiated by Schey in the California Superior Court for the City and County of San Francisco. On March 27, 1989, the superior court granted the Bank's demurrers to and therefore dismissed Schey's first amended complaint on the ground of federal preemption by the National Bank Act.

The California Court of Appeal affirmed in part and reversed in part the trial court's order and judgment by published Opinion and Judgment entered on January 24, 1990. The Bank's petition for rehearing was denied by the California Court of Appeal on February 21, 1990. The Bank raised all federal preemption arguments before the California Court of Appeal.

On April 26, 1990, the California Supreme Court denied the Bank's petition for review. The Bank raised all federal preemption arguments in its petition for review before the California Supreme Court.

II

MATERIAL FACTS

The Bank is a national bank, authorized to do business throughout California. As of September 1987, Shey was an officer and director of the Bank. In 1987, the Bank's board terminated

Schey's employment, and the Bank's holding company removed him as a director of the Bank.

Schey filed suit against the Bank (including various of its directors), alleging various contract and tort causes of action under California wrongful discharge law, including retaliatory discharge and "retaliatory removal of director." Schey essentially alleged that he was discharged and removed as a director because he had reported purported improprieties of other Bank officers to the Comptroller of the Currency.

The trial court sustained the Bank's demurrers and dismissed Schey's First Amended Complaint on the ground that the National Bank Act ("the Act"), which allows an officer of a national bank to be terminated by the bank's board of directors "at pleasure," preempted all of Schey's state-created wrongful discharge claims. In so ruling, the trial Court relied on unanimous federal decisions, including decisions of the United States Court of Appeals for the Ninth Circuit, which interpreted the "at pleasure" language in various federal banking statutes.

Schey appealed the dismissal of his first amended complaint to the California Court of Appeal. The Court of Appeal sustained the dismissal of Schey's contract claims and various of his tort claims on the ground that they were preempted by the National Bank Act. In so holding, the Court relied on the Ninth Circuit's decision in *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520 (9th Cir. 1989), where the Circuit expressly held that the Act's "at pleasure" language preempted *all* California contract and tort wrongful discharge claims, regardless of their character.

However, and despite the breadth of the holding in *Mackey*, the Court of Appeal held that federal preemption did not apply to Schey's tort claim for retaliatory discharge. The Court of Appeal reasoned that California's public policy against discharging "whistle-blowing" employees was consistent with the National Bank Act's public policy favoring the flow of banking information to the Comptroller. Hence, the Court of Appeal concluded that Schey's retaliatory discharge claim was not preempted by the "at pleasure" language of the Act. The Court cited no supporting authority, and rejected as "less than persuasive" and "cryptic" the Ninth

Circuit's decision in *Inglis v. Feinerman,* 701 F.2d 97 (9th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984), and other federal cases, which had expressly held that the "at pleasure" language preempted state law claims for retaliatory discharge.

Equally significant, the Court of Appeal ruled that, as a former director of a national bank, Schey had a private right of action under California law for being removed as a bank director, even if such no such claim existed or was permitted under federal law. In so ruling, the Court noted that no case, federal or state, had ever authorized such a private right of action. The Court of Appeal also disregarded decisions from this Court and various federal courts of appeals which uniformly hold that only the Comptroller may enforce the provisions of the National Bank Act against a national bank or sue a national bank for its violation of the Act or state law.

The California Supreme Court subsequently denied the Bank's petiton for review.

REASONS FOR GRANTING THE WRIT

I

THE DECISION TO ALLOW STATE-CREATED RETALIATORY DISCHARGE CLAIMS AGAINST A NATIONAL BANK CONFLICTS WITH THE OPINIONS OF THE FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF APPEAL, AND RAISES IMPORTANT ISSUES REGARDING FEDERAL BANKING LAW

The California Court of Appeals Opinion conflicts with all circuit decisions addressing the preemptive scope of the National Bank Act, and all but one state court of appeal decisions that have examined the issue. Because of the national importance of this federal banking law issue, and because this Court has never before addressed this issue, Certiorari is warranted under Rule 10.1.(b) and (c) of this Court's Rules.

The "at pleasure" language of the National Bank Act is over 100 years old. It is the same language contained in other federal banking statutes which articulate the rights of federal financial

institutions to terminate their officers. *See* 12 U.S.C. § 1432(a) ("at pleasure" language in Federal Home Loan Bank Act); 12 U.S.C. § 341 (Fifth) ("at pleasure" language in Federal Reserve Act).

The "at pleasure" language provides an important vehicle by which national banks can retain the public's trust in their operation: a bank can terminate an officer who is even remotely suspected of carelessness or untrustworthiness without the fear of repercussions in the form of a wrongful discharge suit following the officer's termination. *See Westervelt v. Mohrenstecher,* 76 F. 118 (8th Cir. 1896). Congress has repeatedly registered its approval of the uniform interpretation of Section 24 (Fifth) that all state wrongful discharge theories are preempted. *See Kemper v. First Nat. Bank,* 94 Ill.App.3d 169, 171, 418 N.E.2d 819, 821 (Ill. App. 1981).[1]

The federal courts have been most frequently called upon to interpret the "at pleasure" language of the National Bank Act and other federal banking statutes. In all cases and without exception, the federal courts have held that state law claims for wrongful discharge, whether based in contract or in tort, are preempted by the federal right to dismiss at pleasure.[2]

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[1] Congress has amended 12 U.S.C. § 24 no fewer than *twenty-six times* since 1922 but has with each amendment left untouched the Board's authority to dismiss officers "at pleasure." Since the Ninth Circuit's decision in *Inglis v. Feinerman* (9th Cir. 1983) 701 F.2d 97, *cert. denied,* 464 U.S. 1040 (1984), Congress has amended the section *five times* without disturbing the "at pleasure" provision or the uncontradicted judicial interpretation that state law theories of discharge in violation of public policy are also preempted by the federal statute. *See Markham v. Cabell,* 326 U.S. 404, 411 (1945) (failure to make changes in statute in a particular respect when the subject is before legislative body and other changes are made indicates intention to leave the law unchanged in that respect).

[2] *See, e.g., Mackey v. Pioneer Nat. Bank,* 867 F.2d 520 (9th Cir. 1989) (National Bank Act); *Morast v. Lance,* 631 F.Supp. 474, 484 (N.D. Ga. 1986), *aff'd,* 807 F.2d 926 (11th Cir. 1987) (National Bank Act); *Wiskotoni v. Michigan Nat. Bank-West,*716 F.2d 378 (6th Cir. 1983) (National Bank Act); *Inglis v. Feinerman,* 701 F.2d 97 (9th Cir.

The Ninth Circuit, with jurisdiction over the federal district courts in California, has been particularly emphatic about the preemptive affect of the Act's "at pleasure" language. In *Inglis v. Feinerman*, 701 F.2d 97 (9th Cir. 1983), *supra*, the Ninth Circuit held that the "at pleasure" language (construed under the Federal Home Loan Bank Act) preempted claims for retaliatory discharge under California law. *Inglis* also involved an alleged "whistleblower" plaintiff who claimed he was dismissed over "his insistence that the bank conform its practices to federal law"—the *exact* claim stated by Schey here. In affirming dismissal of the claim, the Ninth Circuit held that the law provides "no inroads" into the "dismiss at pleasure language." *Inglis*, 701 F.2d at 98-99. More recently, in *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520 (9th Cir. 1989), the Ninth Circuit expressly held that the Act's "at pleasure" language preempted all state and tort wrongful discharge claims, regardless of their character.

The California Court of Appeal's rejection of the Ninth Circuit's holdings in *Inglis* and *Mackey* subjects national banks operating in California to flatly inconsistent rules. If the Opinion is allowed to stand, then whether a former bank officer has a substantive right of action against a national bank in California will depend *entirely* on whether suit is filed in a California state court or a federal district court located in California. Under the current state of confusion, the following anomalous conditions would be true:

1. The wrongful discharge claims of former California bank officers which are filed in the federal district courts in California will be dismissed on the ground that they are preempted (under *Inglis* and *Mackey*).

2. The wrongful discharge claims of former bank officers which are filed in California state courts along with removable federal claims (based on federal statutes, such as the Age Discrimination in Employment Act) may be removed to

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1983), *cert. denied*, 464 U.S. 1040 (1984) (interpreting same language in Federal Home Loan Bank Act); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981) (interpreting identical language in Federal Reserve Act).

federal court, and then will be dismissed (again, under *Inglis* and *Mackey*).

3. Only the wrongful discharge claims of former officers which are filed in California state courts (without any federal claims being asserted) would be permitted.[3]

The Opinion, even though depublished, is but one reflection of the California courts' commitment to ignoring the preemptive affect of the Act in cases involving claims of retaliatory discharge. A year before the Opinion issued, the California Court of Appeal had previously ruled that the Act did not preempt California retaliatory discharge claims. That earlier opinion, originally reported as *Betz v. National Bank of Southern California* (1988) 203 Cal. App. 3d 402, was ordered depublished by the California Supreme Court on November 17, 1988. More recently, the California Court of Appeal confirmed in a ***published*** opinion the decision to exempt retaliatory discharge claims, like Schey's, from the preemptive scope of the National Bank Act. *See Schillinger v. Wells Fargo Bank,* 219 Cal.App.3d 570, 573-4, 268 Cal.Rptr. 368 (1990). Hence, there is now no question that national banks in California are faced with a definitive ***published*** statement by the California courts of their potential liability to former bank officers in retaliatory discharge cases.

The tragic result of the California court's maverick treatment of preemption is to create a two-track system of justice where the Bank may be exposed to enormous liability in California state courts, but to no liability at all in the federal district courts in California. In *Hanna v. Plumer,* 380 U.S. 460, 467 (1965), this Court emphasized that the objective of the *Erie* doctrine (which outlines the duty of federal courts to follow substantive state law in diversity actions) is "discouragement of forum-shopping and avoidance of inequitable administration of the laws." This Court

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[3] Defendant national banks may not remove these cases to federal court, since the affirmative defense of federal preemption does not appear on the face of the complaint, and therefore does not represent an appropriate basis for removal. *See Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389 (9th Cir. 1988).

has stated that this precise policy should apply in cases in which state courts must decide whether to respect federal precedent on federal questions arising in state court proceedings. See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942). The California Court of Appeals Opinion entirely ignores and is inconsistent with this authority.

The Opinion has created a sea of instability among national banks operating in California, one of the nation's banking centers. National banks in California have always presumed that their employment practices were regulated by federal law: indeed, the Comptroller has enacted regulations on this very subject. *See, e.g.*, 12 C.F.R. 7.5220. Now, California's national banks cannot determine the extent to which federal law, rather than state law, regulates their hiring and firing practices. Without certainty concerning the extent to which federal law controls officer terminations, these banks may be forced to delay or, even worse, avoid officer terminations which may otherwise be necessary to assure the financial security of the banks. This chilling effect is precisely the result which the "at pleasure" language of the Act was intended to prevent.

The Opinion is also inconsistent with the interpretation of the Act adopted by all but one state courts of last resort or appeal that have considered the issue. Except for the New Hampshire Supreme Court, all state courts of last resort or appeal that have addressed the issue have adopted the federal rule that all wrongful discharge claims, whether in contract or tort (including retaliatory discharge claims), are preempted by the "at pleasure" language of the Act.[4] New Hampshire alone has held that the Act does not preempt tort claims for wrongful discharge. *See Rohde v. First Deposit National Bank*, 127 N.H. 107, 497 A.2d 1214 (N.H. 1985).

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[4] *Blote v. First Federal Sav. and Loan Assoc. of Rapid City*, 422 N.W.2d 834, 838 (S.D. 1988); *Berry v. Amer. Fed. Savings*, 730 P.2d 905 (Colo.App. 1986); *Ambro v. American Nat. Bank and Trust Co.*, 152 Mich.App. 613, 394 N.W.2d 46 (1986); *Alfano v. First National Bank of Highland*, 490 N.Y.S.2d 56 (N.Y.A.D. 1985); *Kemper v. First Nat. Bank*, 94 Ill.App.3d 169, 418 N.E.2d 819 (Ill.App. 1981).

The California Court of Appeal Opinion admits that the Act preempts most tort claims for wrongful discharge, but arbitrarily creates an exception for state retaliatory discharge claims. In short, the Opinion is a hybrid between the New Hampshire no-preemption rule and the full-preemption rule recognized by all other federal and state courts.

In the final analysis, the Opinion reflects a dangerous trend by the California courts of treating national banks differently than do the federal courts in California and differently than do other state courts outside of California. The California courts have decided that they find neither persuasive nor binding the many federal and other state decisions interpreting the Act to fully preempt all state wrongful discharge claims.

This Court has never addressed the preemptive scope of the "at pleasure" language of the Act. Only this Court can resolve the present dispute between the California courts and all other federal courts of appeal and virtually all other state courts of appeal.

II

THE DECISION TO ALLOW STATE-CREATED RETALIATORY REMOVAL OF DIRECTOR CLAIMS AGAINST A NATIONAL BANK CONFLICTS WITH THE OPINIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEALS, AND RAISES IMPORTANT ISSUES REGARDING THE COMPTROLLER'S POWER OVER NATIONAL BANKS

The Opinion recognizes a new tort under California law, that of "wrongful retaliatory removal of director." In essence, the California Court of Appeal has held that a former director of a national bank board can state a claim under *state law* if his removal from the board allegedly does not comply with state law or federal law. This conclusion flatly conflicts with two different lines of cases from the federal courts.

First, it conflicts with uncontroverted decisions of this Court and various federal courts of appeals which have held that the prosecutorial authority given to the Comptroller under Section 93

of the Act to enforce violations of the Act is exclusive, and precludes common-law contract or tort liability against a national bank or its directors for any violations of the Act.[5] As the Ninth Circuit has noted, this rule has been adopted in order to shield national banks "from standards of liability that varied from state to state." *Harmsen v. Smith*, 693 F.2d 932, 939 (9th Cir. 1982).

Second, the Opinion conflicts with unanimous federal circuit decisions which hold that the Comptroller's extensive authority under the Act prevents the maintenance of any state law private right of action against the Bank (even if no violation of the Act is alleged) by anyone other then the Comptroller.[6] As the Third Circuit noted in *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980), the Act gives the Comptroller exclusive authority to enforce any "violation of . . . law", federal or state, by national banks. 630 F.2d at 988-89 (quoting from 12 U.S.C. § 1818(b)(1)). Hence, even assuming that Schey's removal as a director from the Bank was in violation of California law, only the Comptroller would have authority to enforce or maintain any such claim.

The consequences of the new liability imposed by the Opinion on national banks could be disastrous. If the Opinion stands, then the appointment and removal of national bank directors will be determined by state law, not federal law. This is flatly in conflict with specific provisions of the Act concerning bank directors. *See*

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[5] *See, e.g., Chesbrough v. Woodworth*, 244 U.S. 72, 78 (1917); *Yates v. Jones Nat'l Bank*, 206 U.S. 158 (1907); *Federal Deposit Ins. Corp. v. McKnight*, 769 F.2d 658, 661 (10th Cir. 1985); *Harmsen v. Smith*, 693 F.2d 932, 939 (9th Cir. 1982).

[6] *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980) (even if state anti-redlining statute could be applied to national banks, the statute could only be enforced by the Comptroller); *Conference of Federal Savings and Loan Ass'n v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1979)(even if California's Housing Financial Discrimination Act can be applied to a national bank, only the Federal Home Loan Bank Board could enforce it); *Otero Sav. & Loan Ass'n v. Federal Home Loan Bank*, 665 F.2d 279 (10th Cir. 1981) (recognizing the rule stated in *Long* and *Stein*).

12 U.S.C. §§ 71 through 78. If this principle were adopted by each state, then the liability of a national bank will vary from state to state, depending entirely on the law of the state in which suit is brought. This state-by-state variation in liability is precisely the result that federal preemption was intended to avoid, but which the California courts are willing to foster, despite federal authority's contrary mandate. *See Easton v. Iowa,* 188 U.S. 220, 231-32 (1903) (recognizing that Comptroller's extensive authority over national banks precludes complementary legislation by the states).

California has chosen to encroach onto federal soil. Certiorari is warranted to stop this trespass, and to resolve this federal banking law issue which is critical to the many national banks operating nationwide.

CONCLUSION

The uncertainty which national banks in California face because of the outright conflict between federal circuit and California state decisions threatens their decision-making process. Short of a writ issuing, the ultimate outcome of retaliatory discharge suits against national banks in California will be pre-determined by the plaintiff's choice of forum. Granting this Petition will secure uniformity of decision concerning the meaning of the National Bank Act, and its application to national banks throughout the United States. For the aforementioned reasons, the Bank respectfully prays that this Court grant this Petition.

Respectfully submitted,

NOSSAMAN, GUTHNER, KNOX & ELLIOTT

By CLAUDE M. STERN
Counsel of Record and
Counsel for Petitioners

DATED: July 18, 1990

Appendix A

Certified For Publication
In The Court of Appeal
of the State of California

First Appellate District

Division Five

[Filed and Entered January 24, 1990]

Richard F. Schey,
Plaintiff and Appellant,

v.

Trans Pacific National Bancorp et al.,
Defendants and Respondents.

A045751
San Francisco Co.
Super.Ct.No. 896879

A federal statute allowing officers of national banks to be dismissed "at pleasure" (12 U.S.C. §§ 24, Fifth) does not preempt California law providing a cause of action in tort for dismissal in retaliation for reporting legal or regulatory violations to a government agency.

Richard F. Schey sued Trans Pacific National Bank (the Bank), Trans Pacific National Bancorp (a holding company), and various officers and directors of the Bank, alleging breach of contract and various torts arising from his termination as vice-president and director of the Bank. Defendants' demurrers were sustained as to all causes of action without leave to amend, primarily on the ground that the termination was allowed by 12 United States Code section 24, Fifth. Schey appeals from the ensuing judgment of dismissal. We reverse in part.

On review from the sustaining of a general demurrer, we accept as true all the properly pleaded allegations of the complaint, and

examine them only for their legal sufficiency. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In February 1985 Schey was hired by the Bank as vice-president and senior loan officer. He was elected director in June 1985 and was promoted to senior vice-president in January 1986. While employed by the Bank and serving as one of its directors, Schey discovered that defendant Eddy Chan, Bank president and chairman of the board of directors, had engaged in practices (including commingling of depositors' and personal funds) which were contrary to regulations of the federal Office of the Comptroller of the Currency (OCC), which regulates national banks, as well as contrary to sound banking practice and the best interests of the Bank. Schey brought these facts to the attention of his fellow directors and, when required by law, disclosed them to an investigator from the OCC.

After Schey revealed his concerns, Chan harassed Schey by giving him a false negative evaluation and decreasing his management authority. In November 1986 Schey sought and received assurances from two other directors that his services were still desired and that his employment was secure. Based on those assurances he refrained from seeking other employment.

In September 1987 the executive committee of the Bank board of directors voted to terminate Schey's employment and remove him as a director. In his first cause of action ("Wrongful Retaliatory Termination"), Schey alleges the termination was in retaliation for his reporting of Chan's misconduct. The second cause of action alleges the firing was in violation of written, oral and implied contractual terms. The third and fourth causes of action allege that his removal as director was in violation of an implied covenant of good faith and fair dealing. The fifth alleges fraud and deceit in the assurances of secure tenure Schey received in November 1986, and the sixth alleges negligent misrepresentation as to the same acts. The seventh cause of action alleges that Schey's removal from the board of directors was in violation of public policy.

The trial court ruled all the causes of action barred by a provision of the National Bank Act granting certain powers to

national banks: "To elect or appoint directors, and *by its board of directors to* appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." (12 U.S.C. § 24, Fifth, italics added [hereafter § 24, Fifth].) Section 24, Fifth, has been widely held to preempt all state law breach of contract claims when a national bank officer is terminated by the bank's board of directors. (See, e.g., *Mackey v. Pioneer Nat. Bank* (9th Cir. 1989) 867 F.2d 520, 524 ["An agreement which attempts to circumvent the complete discretion of a national bank's board of directors to terminate an officer at will is void as against public policy"]; *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593, 596-597; *Ambro v. American Nat. Bank and Trust Co.*, (Mich.App. 1986) 394 N.W.2d 46, 48-49.)

I

While national bank officers serve at the pleasure of their boards they may not, in California, be discharged for disclosing to federal regulators the misconduct of their fellow officers. Although Schey was a national bank officer terminated by the Bank's board of directors, section 24, Fifth, does not preempt his tortious discharge claim (the first cause of action).

The federal laws governing national banks do not preempt all state regulation of such banks. Rather, the operations of national banks are generally subject to state laws, which are displaced only where they "infringe the national banking laws or impose an undue burden on the performance of the banks' functions." (*Anderson Nat. Bank v. Luckett* (1944) 321 U.S. 233, 248; *National State Bank, Elizabeth, N.J. v. Long* (3d Cir. 1980) 630 F.2d 981, 985-986.) In these circumstances state law is preempted only to the extent it directly conflicts with the federal provisions or would stand as an obstacle to the full accomplishment of congressional purposes. (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 281.)

Under California law, even an at-will employee may not be fired for reasons which violate an express statutory objective or

undermine a firmly established principle of public policy. (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.) The "public policy" limitation on employer discretion arises from a duty imposed by law, not from any express or implied promises of the contract. (*Id.* at p. 176.) "What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 667, fn. 7.) The tort is independent of the terms of employment, and is therefore equally applicable to an at-will employee and to one with a contract for a specified term. (*Koehrer v. Superior Court* (1986) 181 Cal.App.3d 1155, 1166.)

"There is no question public policy forbids retaliatory action taken by an employer against an employee who discloses information regarding an employer's violation of law to a government agency." (*Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561.) Since 1984 that policy has been codified in Labor Code section 1102.5, subdivision (b). In terms directly applicable to the allegations of this case, that section forbids retaliation "against an employee for disclosing information to a government . . . agency, where the employee has reasonable cause to believe that the information discloses . . . noncompliance with a . . . federal regulation."

Under section 24, Fifth, national bank officers may be dismissed "at pleasure"—that is, at will. But because the "public policy" cause of action derives from a duty imposed by law, fully applicable to at-will employees, it does not follow from the "at pleasure" language that they may be dismissed for reasons violating well-established public policy. The federal statute, while "depriving a national bank of the power to employ its officers other than at pleasure" (*Wiskotoni v. Michigan Nat. Bank-West* (6th Cir. 1983) 716 F.2d 378, 387), does not by its terms remove the remedy provided under state law for an employer's violation of state law or public policy.

Nor does recognition of the action for retaliatory discharge unduly burden the operation of a national bank or obstruct the full execution of congressional policy. Section 24, Fifth, must be construed in light of the entire National Bank Act. Congress has given the OCC extensive regulatory duties regarding the national banks, including the authority to determine whether an association may commence business (12 U.S.C. §§ 26, 27), approval power for long-term real property holdings (12 U.S.C. § 29), approval power for issuance of preferred stock (12 U.S.C. § 51a), rule-making authority over loan limits (12 U.S.C. § 84(d)(1)), approval authority for trust activities (12 U.S.C. § 92a), and the power to prosecute an action for revocation of franchise if any provisions of the National Bank Act are violated (12 U.S.C. § 93). In order that these regulatory powers may be effectively exercised the OCC is authorized to make a "thorough examination" of each national bank "as often as the Comptroller of the Currency shall deem necessary." (12 U.S.C. § 481.) Each bank, in addition, must make periodic reports of condition to the OCC, and the comptroller may call for additional reports "whenever in his judgment the same are necessary for his use in the performance of his supervisory duties." (12 U.S.C. § 161.)

It is apparent that Congress regards the flow of information from the national banks to the OCC to be vital to the OCC's important regulatory functions. This is the same policy served by Labor Code section 1102.5 and the tort action for discharge in retaliation for disclosure of misconduct. While section 24, Fifth, was intended to provide needed discretion for bank boards over the operation of their banks, there is no evidence of congressional intent that the board's discretion be used to obstruct the supervisory efforts of the OCC.[1]

---

[1] In this connection we cannot close our eyes to the devastating wave of collapse and dissolution affecting depository institutions in the past decade, caused in part by a lack of effective regulatory oversight. One part of the congressional response has been a provision of a federal remedy for retaliatory discharge. (Pub.L. No. 101-73 (Aug. 9, 1989) § 932, 103 Stat. 494, 1989 U.S. Code Cong. & Admin. News, No. 6.)

Defendants cite cases holding that state law tort actions, as well as breach of contract claims, are preempted by section 24, Fifth. The tort claims in those cases, however, were not based on retaliatory discharge, but on misrepresentation, bad faith, or other allegations which, it could fairly be said, were derivative of the contract claim. (See *Mackey v. Pioneer Nat. Bank*, supra, 867 F.2d at pp. 522, 525-526 [causes of action for negligent misrepresentation and interference with business relations were preempted]; *Ambro v. American Nat. Bank and Trust Co.*, supra, 394 N.W.2d at p. 49 [negligent misrepresentation and bad faith].)

Inglis v. Feinerman (9th Cir. 1983) 701 F.2d 97, also cited by defendants, did not interpret section 24, Fifth, but a similarly worded statute governing Federal Home Loan banks, 12 United States Code section 1432(a). The plaintiff claimed his discharge violated both contractual terms and public policy, the latter because it was motivated by his insistence that his employer comply with federal law. (*Id.*, at p. 99.) Without analysis or citation of authority the court stated that the tort claim was barred because under section 1432(a) "no inroads into the 'dismiss at pleasure' language" were allowed. (Ibid.) The lack of analysis or authority for Inglis' cryptic pronouncement makes it less than persuasive. It is not directly on point, as it concerns a different statute and a somewhat different claim for relief. Even were it on point, we would not be bound by it. (*Rohr Aircraft Corp. v. County of San Diego* (1959) 51 Cal.2d 759, 764, revd. on other grounds (1960) 362 U.S. 628.) We decline to follow it here.

We conclude that the "at pleasure" language of section 24, Fifth, was not intended to allow a national bank officer to be discharged in retaliation for reporting regulatory violations to the Comptroller of the Currency. It therefore does not preempt California law allowing a claim for tortious discharge under such circumstances.

II

Schey has also stated a cause of action for retaliatory removal from the board of directors. Demurrers were sustained as to the

third, fourth and seventh causes of action on the ground that Schey had no "private right of action" against defendants for removal from the board. On appeal defendants hold to that line of argument, maintaining that the National Bank Act affords no private right of action by a former director for violation of its provisions. Schey, however, did not allege his removal was in violation of the National Bank Act. He alleged that his removal violated an implied covenant of good faith and fair dealing (causes of action three and four) and public policy (cause of action seven).

The bad faith claims must fail as Schey has alleged no contractual relationship to which an implied covenant might adhere. He alleged that his "status" as director contained such a covenant, but neither below nor in this court has he explained or supported that legal assertion. In any event, a separate remedy for bad faith would be unavailable under the principles announced in *Foley v. Interactive Data Corp.*, supra, 47 Cal.3d at pages 690-700, in which tort damages were held unavailable for breach of the implied covenant in an employment relationship.

Schey's allegations that his removal violated public policy, however, state a claim as valid as his parallel action for tortious discharge. We see no reason why the executive committee, which could not retaliate against him by removing him as vice-president, should be able with impunity to retaliate by voting to remove him as director. (See *Garcia v. Rockwell Internat. Corp.*, supra, 187 Cal.App.3d at p. 1561 [*Tameny* action available for any retaliatory disciplinary action by employer].)

National bank directors are elected by the shareholders. They hold office "for one year, and until their successors are elected and have qualified." (12 U.S.C. § 71.) Schey's one-year minimum term began in June 1985, and he was not removed until September 1987. But he alleges he was removed by the executive committee "and not by any action of the shareholders."

Nothing in the National Bank Act allows a board of directors, much less its executive committee, to remove a fellow director. Generally the power to remove a director or officer is incidental to the power to appoint (*American Center For Education. Inc. v.*

Cavnar (1978) 80 Cal.App.3d 476, 492), and directors can therefore be removed only by the shareholders, not by fellow directors. (See 2 Fletcher on Corporations (1982 ed.) § 354, p. 158; Annot., Removal of Corporate Officers (1929) 63 A.L.R. 776, 781-782; Corp. Code, § 303 [removal by vote of outstanding shares].)

Our research has found no case recognizing a tort remedy for wrongful removal from a board of directors. But accepting the allegations of the complaint as true, Schey's removal as director violated the fundamental public policies favoring full revelation of misconduct to the federal regulatory agencies, and was unauthorized by law. It deprived him of a position which he alleges was valuable to him, and in which he could have legitimately expected to remain until a successor was duly elected. If he can prove these allegations and show some damages distinct from those arising from his dismissal as vice-president, he should be allowed a remedy.

III

Schey alleged he was terminated by vote of the executive committee. The discretion created by section 24, Fifth, belongs only to the board of directors, and termination by some other officer or body is not privileged by the statute. (*Wiskotoni v. Michigan Nat. Bank-West,* supra, 716 F.2d at p. 387; *Mahoney v. Crocker Nat. Bank* (N.D.Cal. 1983) 571 F.Supp. 287, 290-292.) The power to terminate may, however, be assigned to an executive committee of the board, and when such an assignment has been made the termination remains privileged under section 24, Fifth. (*Mackey v. Pioneer Nat. Bank.* supra, 867 F.2d at p. 525.) The question is whether the record shows the executive committee acted on authority of an assignment.

The National Bank Act is silent as to the powers of an executive committee; a regulation of the OCC, 12 Code of Federal Regulations section 7.4425, provides that the board of directors of a national bank may assign its duties, but does not define the duties which must or may be assigned to an executive committee. Nor is there any general rule of corporate law provid-

ing an executive committee with the power to terminate officers. On the contrary, such committees have only the authority granted them by statute, by the corporate charter or by action of the full board, and in many states the range of assignable authority is expressly limited by statute. (2A Fletcher on Corporations, op. cit. supra, § 552.2, p. 9; see, e.g., Corp. Code, § 311 [board may form executive committee and assign it authority by resolution or bylaw, within limits set by section].) Some states do not allow executive committees to be assigned the authority to remove officers. (See, e.g., N.J. Stats. § 14A:6-9.) We therefore cannot assume that the executive committee of the Bank had such authority.

Schey has, however, alleged that each defendant in this action was the agent and employee of each remaining defendant, and "was at all times herein mentioned acting within the scope of such agency and employment." Among the defendants are the Bank and several members of the Bank's executive committee. It is apparent, moreover, that the liability of several individual defendants is premised on their votes, as directors and executive committee members, to dismiss Schey since no other harmful actions are ascribed to them. The implication is that the executive committee members acted within the scope of their corporate authority in firing Schey. This implication is confirmed by discarded pleadings from the original complaint. There, Schey alleged that the Bank either preapproved or ratified each of the other defendants' actions, and that his firing constituted a breach of contract by "the Board of Directors." In the absence of an explanation for the omission of these allegations from the superseded complaint, we may take notice of them and read them into the amended complaint. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.)

We conclude that, for purposes of the demurrer, Schey's firing was undertaken on the authority of the Bank's board of directors, and was thus facially within the protection of section 24, Fifth, preempting any contractual claim.

Schey nevertheless contends his causes of action for misrepresentation, directed at the two directors whom he alleges assured him his employment was secure, are not preempted by section 24,

Fifth. We disagree. Schey alleged simply that two directors assured him his tenure was secure, and he relied on that assurance. His reliance implies he believed they spoke for the board or the Bank. An action based on those assurances runs squarely against section 24, Fifth, which prevents national banks from obliging themselves to employ officers other than at pleasure. If the contract claim is barred, so must be the claim for misrepresentation, since the alleged misrepresentation is simply a promise of secure employment. (*Ambro v. American Nat. Bank and Trust Co.*, supra, 394 N.W.2d at p. 49; *Mackey v. Pioneer Nat. Bank*, supra, 867 F.2d at pp. 525-526; cf. *Kozlowsky v. Westminster Nat. Bank*, supra, 6 Cal.App.3d at pp. 597-598 [officer could maintain cause of action for misrepresentation where alleged misrepresentation related to ownership of bank, not employment of plaintiff].)

The judgment of dismissal is reversed as to the first and seventh causes of action and affirmed as to the remaining causes of action.

LOW, P. J.

We concur:

KING, J.
HANING, J.

Appendix B

Court of Appeal of the State of California
In and for the
First Appellate District

Division: 5

[Filed and Entered Feb. 21, 1990]

Schey, Richard F.
vs.
Trans Pacific National Bancorp., et al.

A045751
San Francisco County No. 896879

By The Court:

The petition for rehearing is denied.

Dated: Feb. 21 1990 Low, P.J.

(Before Low, P.J., King, J. and Haning, J.)

Appendix C

Order Denying Review

After Judgment by the Court of Appeal,

First Appellate District, Division Five, No. A045751
S014412
In The Supreme Court of the State of California

In Bank

[Filed and Entered April 26, 1990]

Richard F. Schey, Appellant
v.
Trans Pacific National Bancorp et al., Respondents

Respondents' petition for review denied.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed January 24, 1990, which appears at 217 Cal.App.3d 432. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

MOSK
Acting Chief Justice

Appendix D

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Attorneys for Defendants

[Filed and Entered March 27, 1989]

Superior Court of the State of California
For the City and County of San Francisco

Richard F. Schey,
Plaintiff,
v.
Trans Pacific National Bancorp.,
Trans Pacific National Bank,
Eddy S.F. Chan, Dr. Arthur M.
Auerbach, James A. Babcock,
John K. Lee, Ray M. Lotto,
John T. Stewart, Simon S. Teng,
and Doe I through Doe 200,
Defendants.

No. 896879
Judgment of Dismissal

IT IS HEREBY ORDERED, DECREED AND ADJUDGED, pursuant to the Order Sustaining Demurrers Without Leave To Amend entered in this action, that this action be and hereby is dismissed with prejudice.

DATED: March , 1989

The Honorable Judge Raymond J. Arata
Judge of the Superior Court

Appendix E

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Attorneys for Defendants

[Filed and Entered March 27, 1989]

Superior Court Of The State Of California
For The City And County Of San Francisco

Richard F. Schey,
Plaintiff,
v.
Trans Pacific National Bancorp.,
Trans Pacific National Bank,
Eddy S.F. Chan, DR. Arthur M.
Auerbach, James A. Babcock,
John K. Lee, Ray M. Lotto,
John T. Stewart, Simon S. Teng,
and DOE I through DOE 200,

Defendants.

No. 896879
Order Sustaining Demurrers Without Leave to Amend

The Court has before it the separate Demurrers of each of the defendants, Trans Pacific National Bancorp., Trans Pacific National Bank, Eddy S.F. Chan, Dr. Arthur M. Auerbach, James A. Babcock, John K. Lee, Ray M. Lotto, John T. Stewart and Simon S. Teng (collectively "defendants") to the First Amended Complaint of plaintiff Richard Schey ("Schey"). The hearing on these Demurrers came on regularly before the Court, the Honorable Judge Raymond Arata presiding, on March 3, 1989, at 10:00 a.m. Claude M. Stern of Nossaman, Guthrier, Knox & Elliott ap-

peared on behalf of defendants. Robert F. Katz appeared on behalf of Schey. The Court has reviewed the memoranda and authorities submitted both in support of and in opposition to the Demurrers, and has given the parties opportunity to present argument and has heard argument on the Demurrers. Now, therefore, and good cause appearing, the Court hereby orders and decrees that each and all the Demurrers to the First Amended Complaint are sustained without leave to amend on the following grounds:

1. As to the first, second, third, fourth, fifth, sixth and seventh causes of action asserted in the First Amended Complaint, the Court finds that Schey has failed to state facts sufficient to constitute a cause of action against the defendants, or any of them, on the grounds that each such cause of action is preempted by federal law, specifically by the National Bank Act, 12 U.S.C. Section 24. (See Demurrer By Defendants (And Each Of Them) To The First Amended Complaint, filed on February 6, 1989, at pp. 1-5, paras. 1-8.)

2. As to the third, fourth and seventh causes of action asserted in the First Amended Complaint, the Court finds that Schey has failed to state facts sufficient to constitute a cause of action against the defendants, or any of them, on the grounds that Schey has no standing to assert any private right of action against the defendants, or any of them. (See Demurrer By Defendants (And Each Of Them) To The First Amended Complaint, filed on February 6, 1989, at pp. 3, 4, paras. 4, 5 and 8.)

DATED: March 24, 1989

THE HONORABLE JUDGE
RAYMOND J. ARATA
Judge of the Superior Court

APPROVED AS TO FORM:
DATED: March 14, 1989

ROBERT N. KATZ
Attorneys for Plaintiff
Richard F. Schey